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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

LESTER PHILLIP BLAKE, JR.,	)	Case No. CV 12-5783-DDP (OP)
Petitioner,	)	
v.	)	MEMORANDUM AND ORDER RE:
P. D. BRAZELTON,	)	DISMISSAL OF PETITION FOR WRIT
Respondent.	)	OF HABEAS CORPUS (28 U.S.C. §
	)	2254) AS SUCCESSIVE

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I.

**INTRODUCTION**

On June 25, 2012, Lester Phillip Brake Jr. ("Petitioner") constructively filed a Petition for Writ of Habeas Corpus by a Person in State custody pursuant to 28 U.S.C. § 2254 ("Petition").<sup>1</sup> (ECF No. 1.)

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<sup>1</sup> The prison mailbox rule holds that a habeas petitioner's state and federal filings are constructively filed when turned over to prison officials for forwarding to the Clerk of the Court. See, e.g., Smith v. Duncan, 297 F.3d 809, 814 (9th Cir. 2002); Huizar v. Carey, 273 F.3d 1220, 1223 (9th Cir. 2001). The Court has utilized the signature date on the current Petition as the relevant filing date since the signature date is the earliest date on which Petitioner could have turned the

(continued...)

Pursuant to Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts, the Court has examined the current Petition and finds that it plainly appears from its face that Petitioner is not entitled to relief in the district court. Specifically, the Court finds that the Petition is subject to dismissal as second and successive.<sup>2</sup>

## II.

### PROCEDURAL HISTORY

On November 3, 2003, Petitioner was convicted after a jury trial in the Los Angeles County Superior Court of two counts of sexual penetration by foreign object (Cal. Penal Code § 289(a)(1)), forcible rape (Cal. Penal Code § 261(a)(2)), forcible oral copulation (Cal. Penal Code § 288a(c)(2)), and incest (Cal. Penal Code § 285). (Clerk's Transcript ("CT") at 279-82, 286.) Petitioner was also convicted of misdemeanor assault (Cal. Penal Code § 240), which was a lesser included offense to assault with intent to commit a felony. (Id. at 285.)

Petitioner waived jury trial on his prior convictions (Reporter's Transcript ("RT") at 407-10, 486-89) and, in a bifurcated proceeding, the trial court found true the allegations that he suffered three prior convictions, one of which qualified as an enhancement under California Penal Code sections 667.61(a) and (d), and all three of which qualified as strikes under California Penal Code sections 667(a)(1), 667(b)-(i), and 1170.12(a)-(d). (Id. at 549-53.) On December 18, 2003, Petitioner was sentenced to a total state prison term of 210 years to life with the possibility of parole. (Id. at 562-63; CT at 491-92.)

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<sup>1</sup>(...continued)  
Petition over to the prison authorities for mailing.

<sup>2</sup> All references to Clerk's Transcript, Reporter's Transcript, and Lodgments are taken from the Report and Recommendation issued in CV 05-7109-DDP (OP).

1       Petitioner appealed the judgment to the California Court of Appeal.  
 2 (Lodgment 3.) On September 8, 2004, the court of appeal affirmed the judgment,  
 3 but remanded the case for resentencing pursuant to Blakely. (Lodgment 6 at 7,  
 4 11.)

5       On or about September 22, 2004, Petitioner filed a petition for review in the  
 6 California Supreme Court. (Lodgment 7.) On December 1, 2004, the supreme  
 7 court denied the petition. (Lodgment 8.)

8       On March 29, 2005, the matter was remanded to the trial court for  
 9 resentencing. (Lodgment 16.) Petitioner was then sentenced to a total state prison  
 10 term of thirty-three years. (Id. at 6; Lodgment 1.)

11       On or about June 16, 2005, Petitioner appealed again to the California Court  
 12 of Appeal, arguing that his upper term and consecutive term sentences violated the  
 13 Constitution. (Lodgment 9.) On October 26, 2005, the court of appeal affirmed  
 14 Petitioner's conviction and sentence. (Lodgment 11.)

15       On October 14, 2005, Petitioner filed a habeas corpus petition in the  
 16 California Supreme Court. (Lodgment 12.) On September 13, 2006, the supreme  
 17 court denied the petition. (See California Supreme Court, Case No. S138174.)<sup>3</sup>

18       On November 29, 2005, Petitioner filed a second petition for review in the  
 19 California Supreme Court. (Lodgment 14.) On January 4, 2006, the supreme  
 20 court denied the petition. (Lodgment 15.)

21       On September 29, 2005, Petitioner filed his first § 2254 petition in this  
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 24       <sup>3</sup> This Court is permitted to take judicial notice of orders, decisions, and  
 25 proceedings from other courts. See Holder v. Holder, 305 F.3d 854, 866 (9th Cir.  
 26 2002) (district courts are permitted to take judicial notice of orders and briefs from  
 27 other courts); United States ex rel. Robinson Rancheria Citizens Council v.  
 28 Borneo, Inc., 971 F.2d 244, 248 (9th Cir. 1992) (courts "may take notice of  
 proceedings in other courts, both within and without the federal judicial system, if  
 those proceedings have a direct relation to matters at issue").

1 District. (CV 05-7109 ECF No. 1.) On March 28, 2006, Petitioner filed a second  
 2 § 2254 petition in this District. (CV 06-1856-DDP (OP) ECF No. 1.) On June 13,  
 3 2006, this Court consolidated both cases, and CV 05-7109 became the controlling  
 4 case for all purposes. On May 1, 2007, Petitioner's Second Amended Petition  
 5 ("SAP") became the operative pleading. On August 16, 2011, Judgment was  
 6 entered denying the SAP and dismissing the action with prejudice. (CV 05-7109  
 7 ECF No. 88.) On August 17, 2011, an Order was entered denying the issuance of  
 8 a certificate of appealability. (Id. ECF No. 89.)

9 In 2011 and 2012, Petitioner sought habeas relief in the state courts.  
 10 However, all of his petitions were denied. (Pet. Unnumbered Exs.)

### 11 III.

### 12 DISCUSSION

#### 13 A. Standard of Review.

14 This Court may entertain a habeas application on behalf of a person who is  
 15 in custody pursuant to a state court judgment and in violation of the Constitution,  
 16 laws, or treaties of the United States. See 28 U.S.C. § 2254(a). The Court need  
 17 neither grant the writ nor order a return if it appears from the application that the  
 18 applicant is not entitled to relief. See 28 U.S.C. § 2243. "If it plainly appears  
 19 from the face of the petition and any exhibits annexed to it that the petitioner is not  
 20 entitled to relief in the district court, the judge must dismiss the petition and direct  
 21 the clerk to notify the petitioner." Rule 4 of the Rules Governing Section 2254  
 22 Cases in United States District Courts, 28 U.S.C. foll. § 2254; see also Hendricks  
 23 v. Vasquez, 908 F.2d 490, 491 (9th Cir. 1990) (summary dismissal is appropriate  
 24 where the allegations in the petition are vague or conclusory, palpably incredible,  
 25 or patently frivolous or false).

26 Title 28 U.S.C. § 2244 is entitled "Finality of determination" and provides  
 27 in pertinent part that:

28 (b)(1) A claim presented in a second or successive habeas corpus

1 application under section 2254 that was presented in a prior  
2 application shall be dismissed.

3 (2) A claim presented in a second or successive habeas corpus  
4 application under section 2254 that was not presented in a prior  
5 application shall be dismissed unless--

6 (A) the applicant shows that the claim relies on a new  
7 rule of constitutional law, made retroactive to cases on  
8 collateral review by the Supreme Court, that was  
9 previously unavailable; or

10 (B)(i) the factual predicate for the claim could not have  
11 been discovered previously through the exercise of due  
12 diligence; and

13 (ii) the facts underlying the claim, if proven and viewed  
14 in light of the evidence as a whole, would be sufficient to  
15 establish by clear and convincing evidence that, but for  
16 constitutional error, no reasonable factfinder would have  
17 found the applicant guilty of the underlying offense.

18 (3)(A) Before a second or successive application permitted by this  
19 section is filed in the district court, the applicant shall move in the  
20 appropriate court of appeals for an order authorizing the district court  
21 to consider the application.

22 28 U.S.C. § 2244(b).

23 Generally speaking, a petition is second or successive if it raises claims that  
24 were or could have been adjudicated on the merits in a previous petition. Cooper  
25 v. Calderon, 274 F.3d 1270, 1273 (9th Cir. 2001). Moreover, although a  
26 dismissal based upon the statute of limitations does not include an examination of  
27 the merits of the underlying substantive claims presented in the petition, such a  
28 dismissal is considered an adjudication of the merits for purposes of determining

whether a subsequent petition is successive under the AEDPA. McNabb v. Yates, 576 F.3d 1028, 1030 (9th Cir. 2009) (holding that dismissal of a habeas petition as time barred under 28 U.S.C. § 2244(d)(1) constitutes a disposition on the merits and renders a subsequent petition second or successive for purposes of 28 U.S.C. § 2244(b)); Reyes v. Vaughn, 276 F. Supp. 2d 1027, 1029 (C.D. Cal. 2003).

As set forth above, before a second or successive application permitted under 28 U.S.C. § 2244 is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application. 28 U.S.C. § 2244(b)(3)(A). Furthermore, “[a] district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.” 28 U.S.C. § 2244(b)(4); see also Cooper, 274 F.3d at 1274 (once petition recognized as “second or successive” under § 2244(b), district court lacks jurisdiction to consider petition absent authorization from court of appeals) (citations omitted).

#### **B. Analysis.**

It appears from the face of the Petition that Petitioner is challenging the same 2003 conviction in the Los Angeles County Superior Court of two counts of sexual penetration by foreign object (Cal. Penal Code § 289(a)(1)), forcible rape (Cal. Penal Code § 261(a)(2)), forcible oral copulation (Cal. Penal Code § 288a(c)(2)), and incest (Cal. Penal Code § 285), as the prior § 2554 petition filed in this District. (Compare CV 05-7109 ECF No. 1 with CV 12-5783 ECF No. 1.) On August 16, 2011, Judgment was entered denying the prior petition and dismissing the action with prejudice. (CV 05-7109 ECF No. 88.) Petitioner has not filed a notice of appeal from that Judgment, nor has he filed a request for a certificate of appealability in the Ninth Circuit.

In the current Petition, Petitioner seeks to raise numerous additional claims that were not presented in his prior § 2254 petition. (Pet. at 4-7.) Since the

1 current Petition is successive, Petitioner must seek an order from the Ninth Circuit  
2 Court of Appeals authorizing this Court to consider the Petition. 28 U.S.C. §  
3 2244(b)(3)(A). This Court finds no indication that Petitioner has obtained such  
4 approval prior to the filing of the current Petition. Thus, this Court lacks  
5 jurisdiction to address the merits of the Petition. See 28 U.S.C. § 2244(b)(3);  
6 Cooper, 274 F.3d at 1274 (stating that failure to request the requisite authorization  
7 to file a second or successive § 2254 petition from the circuit court deprives the  
8 district court of jurisdiction).

9 **IV.**

10 **ORDER**

11 IT IS THEREFORE ORDERED that the Petition is hereby dismissed  
12 without prejudice as successive, and Judgment shall be entered accordingly.

13 The Deputy Clerk of the Court is directed to send Petitioner a copy of this  
14 Order.

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16 DATED: October 23, 2012



HONORABLE DEAN D. PREGERSON  
United States District Judge

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19 Presented by:



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22 HONORABLE OSWALD PARADA  
United States Magistrate Judge  
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